A WRITTEN BRIEF FROM THE GOVERNMENT
OF THE NORTHWEST TERRITORIES

TO

THE METIS AND NON-STATUS INDIAN
CONSTITUTIONAL REVIEW COMMISSION

BY

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ABORIGINAL RIGHTS AND CONSTITUTIONAL
DEVELOPMENT.

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INTRODUCTION

On behalf of the Legislative Assembly and the Government of the Northwest Territories I would like to express our appreciation for this opportunity to submit a written brief on the issues that relate to constitutional development and reform. I would like to outline for your Commission the concerns expressed by the NWT Legislative Assembly about the current debate on the constitution of Canada as it relates to constitutional development in the Northwest Territories.

Some preliminary remarks about the diverse cultural and linguistic character of the NWT Legislative Assembly are deemed appropriate since it is important that it is well understood that the Assembly does indeed represent the various peoples of the NWT. The ninth Legislative Assembly, which was elected on October 1, 1979, is a remarkably accurate cross-section of the NWT. Of the twenty-two members, nine are Inuit, three are Dene and two are Metis. Several of the members have held positions in native organizations, and the Assembly as a whole can claim to be properly representative of all the people of the Northwest Territories.

General

In this current round of the constitutional debate there is an opportunity for the Government of the Northwest Territories and Aboriginal peoples of Canada to secure their true and rightful place in Canadian federalism. Our Legislative Assembly, which has been fully elected and representative of the native majority of our population since 1975, has been denied fair treatment as a legitimate and functioning government. We seek to redress this grievance through the constitutional process by ensuring that the status of our government and the special interests of northern

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people are confirmed in the constitution itself.

It is clear then that we are committed to Canadian unity. It is indeed ironic that while some factions both in Western and Eastern Canada are attempting to bring about secession from Canada, northerners are still trying to earn basic rights of partnership in the existing federal system. Native organizations too are seeking the entrenchment of certain rights and freedoms in the constitution.

Our Legislative Assembly has recently debated the issue of creating two territories in the Northwest Territories and have agreed-in-principle to division subject to the expressed will, by public debate and plebiscite, of the people of the N.W.T. In view of this it may not appear that the Government of the Northwest Territories is operating in a permanent political environment, however, the Assembly has given our Executive Committee a clear mandate to seek changes in the Canadian constitution that will benefit all the people of the North regardless of the number of jurisdictions that may evolve.

Constitutional Conferences and Amendment Process

A basic principle of Canadian federalism, one which has only rarely been applied to the North, is that adjustments in federal-regional relationships should occur only after reasonable consultation and negotiation. The current federal patriation proposal calls for the holding of annual constitutional conferences of First Ministers (Proposed Constitution Act (1981) Section 35) until a general procedure for amending the constitution takes effect. Elected ministers of the NWT are excluded from full participation in this process as are the aboriginal peoples. We find

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this unacceptable and have so testified before the Joint Senate-Commons Committee on the Canadian Constitution. Over the past several years, the GNWT has sought participation in the First Ministers' Conference. Until September 1980 we were only part of the federal government delegation with the Minister of Indian Affairs and Northern Development protecting our interests. Along with native organizations we were accorded observer status in September of 1980 but that is still far short of being given the opportunity to participate in a conference that was of vital importance to us all. We recommended to the Joint Senate-Commons Committee on the Constitution that amendments be made to Part IV of the proposed Act to ensure that the elected leaders of the Territories are invited to attend the annual conferences. We support the native organizations of Canada in their endeavours to gain similar representation at such conferences.

The most recent drafting of the proposed Act provides in section 35(3) for the two territories "...to participate in the discussion on any item on the agenda of a conference.....that in the opinion of the Prime Minister directly affects the Yukon Territory and the Northwest Territory." In a similar manner, section 35(2) deals with the aboriginal peoples' participation at such conferences. However, this still does not provide for full participation in the interim amending process for either the GNWT or the aboriginal peoples.

When Part VI of the proposed Act which outlines the procedure for amending the Constitution of Canada comes into effect, there will be

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no provision for the involvement of the two territories and the aboriginal peoples in that process or in future constitutional conferences. We have communicated with the Minister of Justice, Mr. Jean Chretien, urging him that provision be made for our participation in annual conferences and the process of constitutional amendment.

Charter of Rights and Freedoms

The Legislative Assembly has clearly established its position on a number of issues relating to the charter of rights and freedoms contained in Part I of the proposed Constitution Act and has expressed serious concerns about certain elements it contains.

i) Mobility Rights

We maintain that the mobility provisions of section 6 could produce adverse socio-economic impacts on our developing but vulnerable northern labour force and business community. This section effectively prohibits a province or territory from enacting legislation or policies affording employment and business preferences to their residents. The Assembly maintains that the Northwest Territories should either be expressly exempted from the mobility rights provisions of the proposed Charter, or that the Charter be amended to entrench the right of all provincial and territorial governments to enact preferential legislation or policies with the stated objective of improving the economic position of disadvantaged persons or classes of persons -

this includes the aboriginal peoples of this country - within provincial or territorial populations. Short of this kind of amendment, the Assembly will interpret the affirmative action provisions of subsection 15(2) to the greatest extent possible with respect to its social and economic goals and objectives.

ii) Language Rights

Another area of concern is in respect to language. The preservation and indeed the propagation and advancement of native languages should be our aim and be recognized clearly in the constitution of Canada. However, the proposed Charter is not clear on this issue. The federal government interprets section 22 of the proposal as preserving existing rights and privileges relating to languages other than English and French. This provision stops short of conferring official status on aboriginal and other languages in any part of Canada. There are many who would contend that "existing rights and privileges" for such languages are few, ill-defined and often subject to legal challenges. The GNWT may wish to enact official language lesgislation and would not want such initiatives disallowed or contested in the courts. Our government thus submits that special

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status for language rights also be enshrined in the Charter of Rights and Freedoms. This might be achieved by a clause being inserted granting any province or territory the right to enact official language legislation.

iii) Minority Language Educational Rights

Section 23 of the proposed charter deals with Minority Language Educational Rights. There is nothing contained in this section to provide for children of minority groups in Canada other than French or English speaking to receive primary and secondary schooling in the language first learned and still understood. In the NWT our government's policy has been to provide instruction in native languages during the early grades of primary education. A clear recognition of this existing practice needs to be incorporated in the charter of rights under minority language educational rights.

Aboriginal Rights

I was pleased to see the amendments to section 25 of the Charter of Rights and Freedoms proposing to enshrine aboriginal rights in the Constitution and the addition of section 33 recognizing and affirming aboriginal and treaty rights of Indians, Inuit and Metis people of Canada. However, the Legislative Assembly and the GNWT wish aboriginal rights and feedoms to be clearly and categorically set out in the constitution. It is our view that aboriginal rights should be given more than just passing reference in provisions dealing generally with acquired rights and freedoms. The aboriginal peoples of Canada have

enjoyed a special status which must be clearly recognized in the Constitution of Canada. As Mr. Justice Berger stated in his report on the Mackenzie Valley National Gas Pipeline on page XXIII (23):

> Special status for native people is an element of our constitutional tradition, and is recognized by the British North America Act, by the treaties, by the Indian Act and by the statement of policy approved by Cabinet in July 1976.

We in the Northwest Territories are acutely aware of the need for a special status for aboriginal peoples. We have a sizeable population of Dene, Inuit and Metis. Our legislation recognizes their special status and the need to protect their way of life. We feel it paramount for the federal government to entrench in greater detail this unique constitutional tradition of aboriginal rights and freedoms and the recognition of their special status in the proposed constitutional act.

The Development toward Provincial-type Status

The Legislative Assembly and the GNWT are committed to an evolutionaly development toward a provincial-type status for the NWT whether as a single territory or as a number of separate territories. However, if the permanent amending procedure, as outlined in Part VI of the proposed Constitution is adopted in its present form, there will be no constitutional mechanism to permit the Government of Canada, either on its own initiative or on the initiative of the Legislative Assembly of the NWT, to establish a new province or provinces within the territories. We submit that in view of the overall federal authority in the North, the process of creating new jurisdictions in the North is not a matter

of concern to existing provincial governments, but should be a matter negotiated strictly between the federal government and the people of the North. We have written to the Minister of Justice outlining our position on this matter.

Section 29 of the proposed Constitution Act indicates that in respect of the Charter of Rights a reference to a provincial or to the Legislative Assembly or legislature of a province shall be deemed to include a reference to the Yukon and Northwest Territories. We support in principle the inclusion of a Charter of Rights and Freedoms in the Constitutional Act and appreciate that the responsibility we have in this area has been recognized. However, we feel it is not unreasonable to ask that we be accorded the necessary authority to enable us to effectively carry out these and other responsibilities. We urged the Joint Committee to change the Act to accord the Territories the de facto status of provincehood within the necessary constraints that the GNWT operates under legislation of the Parliament of Canada. In short, we are saying that section 29 should, in principle, be extended to the Statute as a whole.

If an evolutionary process of political development is to proceed in the NWT, it is imperative that the peoples of the North be able to negotiate the transfer of greater powers and responsibilities directly with the federal government. We envisage the transfer of powers and responsibility over the next few years in such areas as the control and ownership of land and resources including certain legislative authority over fisheries,

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forestry, electrical power, water and agriculture. We also see the gradual transfer of greater legislative control over such services as Health, Justice, Transportation, Communications and so on. Provision, therefore, must be made in the Constitution Act to allow for this type of evolutionary change.

We are concerned that any new territory or territories created out of the existing Northwest Territories would also benefit from such transfers of power. To ensure that our position on this is clear, a condition that we would place on any transfer of new or expanded power to the present territorial government would be that it apply to any new territory or territories created out of the existing Northwest Territories.

The foregoing will have hopefully provided you with a fairly clear indication of the Legislative Assembly positions and concerns that are pertinent to this current round of the Canadian Constitutional debate. I trust a satisfactory resolution to this major issue can be found in the near future that will meet with the general approval of the majority. It would be unreasonable to believe, however, that everyone will be satisfied with the outcome of this delicate and emotionally charged issue. Nevertheless, we are confident that some consensus can be reached provided a spirit of co-operation and mutual understanding and trust prevails throughout this current debate.